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SUPREME COURT, U.S.

No. 05-1256

IN THE
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF OREGON FOREST INDUSTRIES COUNCIL, OREGON GROCERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, OREGON RESTAURANT ASSOCIATION, ASSOCIATED OREGON INDUSTRIES, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Thomas W. Brown
COSGRAVE VERGEER KESTER LLP
805 SW Broadway
8th Floor
Portland, OR 97205
(503) 323-9000

Counsel for Amicus Curiae

QUESTION PRESENTED

This *amicus* brief addresses generally the first question the Court accepted for review.

TABLE OF CONTENTS

Page

QUESTION PRESENTED 2

I. INTRODUCTION 1
- A. Statement of Interest of *Amici Curiae* 1
- B. Summary of Argument 3

II. ARGUMENT 5
- A. Introduction 5
- B. After *Oberg* and Before *BMW* 6
- C. After *BMW* and Before *Parrott* 7
- D. *Parrott* 10
- E. Between *BMW* and *Campbell* 11
- F. After *State Farm* 12
- G. Summary 15

III. CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Axen v. American Home Products Corp.,
158 Or. App. 292, 974 P.2d 224, *adhered to on recons.*, 160 Or. App. 19, 981 P.2d 340, *rev. den.*, 329 Or. 357, 994 P.2d 124 (1999), *cert. den.*, 528 U.S. 1136, 120 S. Ct. 979, 145 L.Ed.2d 930 (2000) 9

Blume v. Fred Meyer, Inc.,
155 Or. App. 102, 963 P.2d 700 (1998) 7, 9

BMW of North America, Inc. v. Gore,
517 U.S. 559, 116 S.Ct. 1589,
134 L.Ed.2d 809 (1996) 4, 7, 8, 9, 10, 15, 16

Bocci v. Key Pharmaceuticals, Inc.,
158 Or. App. 521, 974 P.2d 758 (1999), *vac'd. and rem'd.*, 332 Or. 39, 22 P.3d 758, *on remand,* 178 Or. App. 42, 35 P.3d 1106 (2001) 11, 13

Boeken v. Philip Morris Inc.,
127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (2 Dist 2005), *cert. den.*, ___ U.S.___, 126 S.Ct. 1567, 164 L.Ed.2d 297 (2006) 16

Boerner v. Brown & Williamson Tobacco Co.,
394 F.3d 594 (8th Cir.2005) 15

Bullock v. Philip Morris USA, Inc.,
138 Cal.App.4th 1029, 42 Cal.Rptr.3d 140 (2 Dist. 2006) ... 16

Cantua v. Craeger,
169 Or. App. 81, 7 P.3d 693 (2000)..... 10

Cooper Industries, Inc. v. Leatherman Tool Group Inc.,
532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)..... 4

Goddard v. Farmers Insurance Co.,
202 Or. App. 79, 120 P.3d 1260 (2005)..... 14

Henley v. Philip Morris, Inc.,
114 Cal.App.4th 1429, 9 Cal.Rptr.3d 29 (1 Dist. 2004), *rev. granted*, 12 Cal.Rptr.3d 591, 88 P.3d 497, *rev. dism'd.*, 18 Cal.Rptr.3d 873, 97 P.3d 814 (Cal. 2004)..... 16

Honda Motor Co. v. Oberg,
512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994)..... 4

Kraemer v. Harding,
159 Or. App. 90, 976 P.2d 1160, *rev. den.*, 329 Or. 357 (1999)..... 10

Lakin v. Senco Products, Inc.,
144 Or. App. 52, 925 P.2d 107 (1996)..... 6

MacCrone v. Edwards Center, Inc.,
160 Or. App. 91, 980 P.2d 1156 (1999), *vac'd. and rem'd.*, 332 Or. 41, 22 P.3d 758, *adh'd. to on remand*, 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.*, 334 Or. 190 (2002)..... 10, 11

Oberg v. Honda Motor Co.,
320 Or. 544, 888 P.2d 8 (1995), *cert. den.*, 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996) 6, 8, 10, 11, 13, 15, 16

Pacific Mutual Life Insurance Co. v. Haslip,
499 U.S. 1, 111 S.Ct. 2711, 125 L.Ed.2d 1 (1991)..... 4

Parrott v Carr Chevrolet,
156 Or. App. 257, 965 P.2d 440 (1998), *rev'd.*, 331 Or. 537, 17 P.3d 473 (2001) 8, 10, 11, 12, 13

Purcell v. Asbestos Corp., Ltd.,
153 Or. App. 415, 959 P.2d 89 (1998), *rev. den.*, 329 Or. 438, 994 P.2d 126 (1999) 6

State Farm Mut. Ins. v. Campbell,
538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) 4, 12, 13, 14, 15, 16

Stranahan v. Fred Meyer, Inc.,
153 Or. App. 442, 958 P.2d 854 (1998), *rev'd. on other grnds.*, 331 Or 38, 11 P.3d 331 (2000) 7

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) ... 4, 16

Van Lom v. Schneiderman,
187 Or. 89, 210 P.2d 461 (1949) 3

Waddill v. Anchor Hocking, Inc.,
175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002) 11, 13

Williams v. ConAgra Poultry Co.,
378 F.3d 790 (8th Cir.2004) 15

Williams v. Philip Morris Inc.,
182 Or. App. 44, 48 P.3d 824, *on reconsid.* 183 Or. App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *cert. granted, vac'd.* and *rem'd.*, 540 U.S. 974, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003) 12, 13, 14, 15

Constitutional Provisions

Oregon Constitution, Article VII (Amended), sec. 3 3

BRIEF OF OREGON FOREST INDUSTRIES COUNCIL, OREGON GROCERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, OREGON RESTAURANT ASSOCIATION, ASSOCIATED OREGON INDUSTRIES, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

I. INTRODUCTION

A. Statement of Interest of *Amici Curiae*

The Oregon Forest Industries Council (OFIC) was founded in 1975 to represent and promote Oregon's forest products industry. OFIC is a nonprofit trade association whose 59 members own and manage approximately 5 million acres of private forestland and manufacture a wide array of forest products. Oregon's forest sector directly accounts for over 85,000 jobs statewide which generate $3.5 billion in wage income. As an advocate for the Oregon forest industry, OFIC represents its members before the Oregon legislature, the Oregon Board of Forestry, rule making agencies, and in courts of law on matters dealing with natural resource management, manufacturing, environmental issues, taxation, and other important concerns of Oregon's forest sector businesses.

Since 1980, the not-for-profit Oregon Grocers Association (OGA) has been working for the state's grocery trade as its legislative watchdog, public relations agency and news and information resource. The OGA serves as the spokesperson for Oregon's grocery industry by promoting the common interests and issues of its membership, and by providing current communications, leadership and member services. The OGA represents the retailers, wholesalers, brokers, manufacturers and

suppliers that support the state's $30 billion dollar grocery industry - one of Oregon's biggest assets.

The National Federation of Independent Business/Oregon Chapter (NFIB/Oregon) represents over 12,000 independently owned Oregon businesses. NFIB/Oregon's purpose is to impact Oregon public policy and be a key business resource for small and independent businesses.

The Oregon Restaurant Association (ORA) is the leading business association for the restaurant industry in Oregon. Comprised of more than 9,000 restaurant and foodservice outlets, the industry employs a work force of more than 110,000, and creates a total economic impact of $9.7 billion. The ORA represents and protects Oregon's restaurant and hospitality businesses and their suppliers at local, state, and national levels.

Associated Oregon Industries (AOI) originated in 1895 as an organization to promote Oregon products. Today, AOI is a nonprofit, statewide business and lobbying organization representing the interests of Oregon businesses. AOI represents over 20,000 businesses and individuals across the state, ranging from small start-up companies to the state=s largest employers. AOI members employ approximately 30 percent of the state=s workforce. As an advocate for business, AOI represents its members in the Oregon Legislature, in courts of law and before rule making agencies on matters dealing with education, the environment, health care, employment and labor law, natural resources, taxation, transportation, workplace safety and workers= compensation, and other issues important to Oregon business.

The Strategic Economic Development Corporation (SEDCOR) is the lead economic development agency for Marion and Polk Counties in Oregon. SEDCOR is a private, non-profit membership organization, composed of over 450 business and community leaders, whose mission is to enhance and diversify the

economy of the Mid-Willamette Valley by supporting and enhancing the performance of existing businesses and recruiting new businesses to Marion and Polk Counties. Over the past 10 years, SEDCOR has been pivotal in developing over $1 billion in new investment in the Mid-Willamette Valley, creating or maintaining over 5,000 basic sector jobs.

The OFIC, OGA, NFIB/Oregon, ORA, AOI and SEDCOR (collectively, the Oregon *amici)* have no monetary interest in the outcome of this case, and their members have no single viewpoint concerning the tobacco industry. The Oregon *amici* are concerned, however, that Oregon courts (and, particularly, the Oregon Supreme Court) fail to understand and follow this Court's existing punitive damages cases, thus opening the door for Oregon juries to impose massive punishment with no meaningful post-verdict review. The Oregon *amici* urge the Court to reject the precedent this case establishes (which, to a large degree, simply extends the precedent established in Oregon over the last 12 years) and its unfortunate detrimental effect on Oregon businesses.[1]

B. Summary of Argument

Before 1994, following the mandate of Oregon's Constitution,[2] Oregon appellate courts did not review a jury's decision on the amount of punitive damages.[3] In *Honda Motor Co.*

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[1] Pursuant to Rule 37.6, the Oregon *amici* state: (1) all parties have consented to this brief; (2) no counsel for any party has authored this brief; and (3) no party or entity, other than the Oregon *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

[2] Article VII (Amended), section 3, of the Oregon Constitution provides:

> "[N]o fact tried by a jury shall be otherwise reexamined by any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

[3] *See Van Lom v. Schneiderman,* 187 Or. 89, 110-13, 210 P.2d 461, 469 (1949) (assessment of punitive damages, because it is a matter "committed to the

v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), this Court explained that such review was required by the Due Process Clause of the Fourteenth Amendment. And, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), and *State Farm Mut. Ins. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), this Court sought to explain, both procedurally and substantively, how review for excessiveness should be conducted and when impermissibly excessive awards exist.[4] Most importantly, at least for this case, in *State Farm*, the Court held that, no matter how reprehensible the defendant=s conduct, federal due process requires that a punitive damages award bear a reasonable relationship to the harm suffered by the plaintiff and to compensatory damages awarded.

All that this Court has done in the last 12 years in its punitive damages jurisprudence has had little, if any, effect in Oregon, particularly on Oregon's high court. After *Oberg*, the Oregon Supreme Court adopted a standard of review for punitive damage awards that was simply a "rubber stamp" for whatever a jury decided. After *BMW*, the Oregon Court of Appeals began to follow this Court's instructions, admonitions and guidance concerning punitive damages review. But the Oregon Supreme Court intervened and, notwithstanding *BMW* and *State Farm*,

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decision of a jury," is a question of fact to which the prohibition in Article VII, section 3 [now Article VII (amended), section 3] applies). This Court adopted the opposite view of what a punitive damages award involves in *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), concluding there that the amount of a punitive damages award is not a "fact" that is "tried" by a jury. 532 U.S. at 431, 121 S.Ct. at 1685.

[4] A process that the Court began in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 2711, 125 L.Ed.2d 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

reasserted its standard of complete deference to jury awards. Indeed, since *Oberg*, the Oregon Supreme Court has not changed a single punitive damages award and Oregon's intermediate appellate court has continued to approve double-digit ratios, including the breathtaking one in this case of 97:1.

How Oregon's appellate courts review punitive damages awards has already concerned this Court. Indeed, it has granted certiorari, vacated, and remanded five Oregon punitive damages cases in the last 12 years, including this one once before in 2004. Now, the Court needs to both make clear to Oregon courts their proper function in reviewing punitive damages awards and express the review process and criteria, particularly the proportionality requirement, in ways that Oregon's appellate courts cannot misunderstand or ignore. Only then, will Oregon businesses be treated comparably (as they should be) to businesses elsewhere when a jury awards punitive damages.

II. ARGUMENT

A. Introduction

Several years ago, Oregon adopted a marketing slogan – "things look different here." For the most part, the slogan reflected the very positive ways that Oregon is a unique place to live, work and, as important to these *amici*, have a business. Since 1995, the "things look different here" slogan has unfortunately manifested itself in Oregon's approach to reviewing seven figure punitive damages awards – that review is markedly differently than in other places. More importantly, the difference makes the risks of doing business in the state, particularly for manufacturers or sellers of products, different from other states in a very negative way, a fact, perhaps, best represented by this case, but certainly not limited to this case alone.

B. After *Oberg* and Before *BMW*

In *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996) (*Oberg II*), on remand from this Court, the Oregon Supreme Court stated that this Court's relevant precedent meant that

> "post-verdict judicial review of a jury's award of punitive damages is as follows: Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole? The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim."

320 Or. at 549, 888 P.2d at 10. Based on that very deferential review standard, the court affirmed a punitive damages award ($5 million) that was 5.4 times the compensatory damages (and 528 times the plaintiff's economic damages).

The Oregon Court of Appeals, applying *Oberg II*'s rule of complete deference to jury awards, not surprisingly, thereafter, refused to disturb all punitive damages awards it was asked to review. See *Lakin v. Senco Products, Inc.*, 144 Or. App. 52, 75-77, 925 P.2d 107, 120-22 (1996), *aff'd.*, 329 Or. 64, 987 P.2d 463 (1999) (in nail-gun injury case, affirming $4 million punitive damages award, even though the plaintiffs had been awarded $6.2 million in compensatory damages, in product defect case); *Purcell v. Asbestos Corp., Ltd.*, 153 Or. App. 415, 433-34, 959 P.2d 89, 100 (1998), *rev. den.*, 329 Or. 438, 994 P.2d 126 (1999) (without any reference to *Oberg II* or this Court's then-existing precedents, affirming $3 million punitive damages award in a mesothelioma injury case with $1.8 million in compensatory damages); *Stranahan v. Fred Meyer, Inc.*, 153 Or. App. 442, 466-71, 958 P.2d

854, 869-72 (1998), *rev'd. on other grnds.*, 331 Or 38, 11 P.3d 331 (2000) (reinstating $2 million punitive damages award, 16 times compensatory damages, where an initiative petitioner was improperly detained and arrested while attempting to collect signatures for petition at a shopping center). The court's message to trial courts was clear: defer to the jury's punitive damages decisions.

C. After *BMW* and Before *Parrott*

After this Court decided *BMW*, the Oregon Court of Appeals appropriately recognized that the Oregon Supreme Court's rule of complete deference to a jury's award could not be reconciled with the searching appellate review mandated by this Court. In *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 963 P.2d 700 (1998), the Court of Appeals said:

> "a reviewing court's determination of whether the punitive damage award is unconstitutionally excessive is not dependent on instructions to the jury or on the jury's considerations. Under *BMW*, although the reviewing court accepts the facts and inferences as the jury found them, evaluating whether a punitive damage award is excessive requires examination of, but not deference to, the jury's award."

155 Or. App. at 113, 963 P.2d 700 (footnote omitted). But, notwithstanding what it understood to be a more vigorous review requirement, the court still affirmed an 18:1 ratio (and a $450,000 punitive damages award) where an African-American woman was detained for about 10 minutes by employees of a grocery store, pursuant to a store policy allowing any customer to be stopped at random to check for receipts. *Id.* at 115-19, 963 P.2d at 707-10.

Later in 1998, in *Parrott v Carr Chevrolet*, 156 Or. App. 257, 965 P.2d 440 (1998), *rev'd.*, 331 Or. 537, 17 P.3d 473 (2001),

the Court of Appeals, for the very first time, refused to approve a jury's punitive damages award. Again, reaffirming that *Oberg II*'s highly deferential review role did not survive *BMW,* the court said:

> "Under *BMW*, the starting point for examination of a punitive damage award is identification of the state's interests that a punitive award is designed to serve. *BMW*, 517 U.S. at 559, 116 S.Ct. at 1591, 134 L.Ed. 2d at 822. Underlying the inquiry are elementary notions of fairness: that persons must receive fair notice of the conduct that will subject them to punishment and also of the severity of the penalty the state may impose. *Id.* 517 U.S. at 560, 116 S.Ct. at 1591, 134 L.Ed.2d at 826. The United States Supreme Court articulated three 'guideposts' to assist in evaluating whether the award exceeds constitutional limits: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered and the punitive damage award; and (3) the difference between the award and the civil or criminal penalties authorized or imposed in comparable cases. *Id.* Although those guideposts are not exclusive, other considerations must be grounded in clear legal principles or historical or community-based standards. *See id.* 517 U.S. at 596, 116 S.Ct. at 1609, 134 L.Ed.2d at 839 (Breyer, J., concurring)."

156 Or. App. at 275, 965 P.2d at 451. In explaining its decision, the court noted:

> [D]efendant did inflict economic injury "intentionally through acts of misconduct," *BMW*, 517 U.S. at 576, 116 S.Ct. at 1599, 134 L.Ed.2d at 827, and we conclude that the record shows that only a sizable award will serve the state's interest in deterring that misconduct in the future. Important to our conclusion is the legislature's decision

> specifically to provide for private enforcement of the [Unlawful Trade Practices Act (UTPA)] through punitive, as well as compensatory, damages. ORS 646.638 ("The court or the jury, as the case may be, may award punitive damages[.]"). As the trial court commented, defendant's conduct here, which was part of its pattern of business, 'blew' the UTPA 'out of the water.' The potential threat of harm reaches well beyond the economic damage suffered by plaintiff, and the record lacks any evidence that defendant has any intention of changing its way of doing business. *See BMW*, 517 U.S. at 579, 116 S.Ct. at 1601, 134 L.Ed.2d at 829 n. 31 ('Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.'). Here, defendant either refused to acknowledge its practices or sought to justify them as acceptable 'hands-off' management policy. We conclude that the trial court erred in reducing the punitive award to $50,000 and that a punitive award of $300,000 is reasonably related to the harm that occurred and is likely to occur."

Id. at 280-81, 965 P.2d at 453-54. (footnotes omitted).

In 1999, the Court of Appeals continued applying *BMW* in a reasonably faithful way but, notwithstanding *Parrott*, the court upheld every punitive damages award it reviewed. *See Axen v. American Home Products Corp.*, 158 Or. App. 292, 974 P.2d 224, *adhered to on recons.*, 160 Or. App. 19, 981 P.2d 340, *rev. den.*, 329 Or. 357, 994 P.2d 124 (1999), *cert. den.*, 528 U.S. 1136, 120 S. Ct. 979, 145 L.Ed.2d 930 (2000) (in a prescription medicine adverse reaction case, affirming $20 million punitive damages award and 8:1 ratio); *Kraemer v. Harding*, 159 Or. App. 90, 976 P.2d 1160, *rev. den.*, 329 Or. 357 (1999) (in case for defamation, intentional infliction of severe emotional distress, and intentional

interference with contractual relations, affirming punitive damages award of $75,000 despite compensatory damages of $127,000); *MacCrone v. Edwards Center, Inc.*, 160 Or. App. 91, 980 P.2d 1156 (1999), *vac'd. and rem'd.*, 332 Or. 41, 22 P.3d 758, *adh'd. to on remand*, 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.*, 334 Or. 190 (2002) (affirming, in intentional infliction of severe emotional distress case, punitive award ($1.25 million) 4.5 times compensatory damages); *Cantua v. Craeger*, 169 Or. App. 81, 7 P.3d 693 (2000) (in sexually-related battery case, affirming 20:1 ratio). So, in reality, the meaningful, searching review that *BMW* required (and which the Oregon Court of Appeals seemed to understand in *Parrott*) became largely ignored.

D. *Parrott*

The Oregon Supreme Court stepped back into the punitive damages fray when it reviewed the Court of Appeals' decision in *Parrott*. 331 Or. 537, 17 P.3d 473 (2001). Not surprisingly, the Supreme Court chose the one case where the Court of Appeals had overturned a jury's punitive damages verdict in light of *BMW*. More importantly, the Oregon Supreme Court showed no regard to what the Court said in that case.

At the outset, the Supreme Court rejected the Court of Appeals' view that *BMW* made *Oberg II*'s rational juror standard inapplicable. 331 Or. at 554, 17 P.3d at 484 ("We conclude, therefore, that the rational juror standard is compatible with and does not differ practically from *BMW*'s gross excessiveness inquiry, and that *BMW* has not 'superseded' the rational juror standard that this court articulated in *Oberg [II]*."). Having reaffirmed *Oberg II*'s improperly deferential review standard, the court then identified five criteria for determining the range of punitive damages that a rational juror would be entitled to award: (1) the statutory and common-law facts that allow an award for the claim at issue; (2) the state interests that the award would serve; (3)

the degree of reprehensibility of the defendant's conduct; (4) the disparity between the award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for similar misconduct. *Id.* at 555, 17 P.3d at 484.[5] Applying those factors, the court reinstated a punitive damages award that was 87 times the jury's compensatory damages award, finding that such a ratio – again, in an economic loss case brought under the Oregon Unlawful Trade Practices Act – "does not raise [our] suspicious judicial eyebrow." 331 Or. at 562, 17 P.3d at 489.

E. Between *BMW* and *Campbell*

Predictably, given its retention of the "rational juror standard" adopted in *Oberg II*, *Parrott* effectively ended any meaningful post-verdict review of punitive damages awards by lower courts in Oregon. *See Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999), *vac'd. and rem'd.*, 332 Or. 39, 22 P.3d 758, *on remand,* 178 Or. App. 42, 35 P.3d 1106 (2001)(in failure to warn of prescription drug side effects case, affirming punitive damages award of $22.5 million to the plaintiff that was 45 times compensatory damages award); *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002) (in products case, where a fishbowl the plaintiff was carrying shattered injuringaintiff's hands and wrists, affirming a 10:1 ratio and $1 million in punitive damages); *Macrone*, 176 Or. App. 355, 356, 31 P.2d 513 (by *per curiam* opinion, adhering to prior decision affirming punitive damages award 4.5 times compensatory damages).

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[5] Although the court held that in Oregon there is no state law review of punitive damages awards, 331 Or. at 553, 17 P.3d at 483, it nevertheless engrafted factors of its own creation to the federal test identified by this Court. And it did so for the stated purpose of determining whether its own "rational juror" standard was satisfied. *Id.*

Finally, in the original appeal in this case, following *Parrott*, the Court of Appeals reinstated the jury's $79 million punitive damages award (that, again, was 97 times the compensatory damages award). *Williams v. Philip Morris Inc.*, 182 Or. App. 44, 48 P.3d 824, *on reconsid.* 183 Or. App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *cert. granted, vac'd.* and *rem'd.*, 540 U.S. 974, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). In partially explaining that decision, the court said:

> In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages. As we have already discussed, defendant's actions, even more than those of the defendant in *Parrott*, were 'particularly egregious' and thus justify particularly strong judicial punishment. *See Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984) (purpose of punitive damages is "not to compensate an injured party, but to give bad actors a legal spanking"). In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury."

182 Or. App. at 71, 48 P.3d at 841.

F. After *State Farm*

Since *State Farm*, Oregon cases have frequently been brought to – and caught -- this Court's attention. The Court granted certiorari, vacated, and remanded the "fishbowl case," *Waddill*. 538 U.S. 974, 123 S.Ct. 1781, 155 L.Ed.2d 662 (2003). On remand, the Court of Appeals, applying *State Farm*, concluded that $1 million in punitive damages was constitutionally excessive

and "[i]n light of the Supreme Court's focus on ratios in the usual case," 190 Or. App. at 183, 78 P.3d at 576, reduced the award to 4 times the compensatory damages award. *Id.* Like *Waddill,* the Court granted certiorari, vacated and remanded *Bocci.* 538 U.S. 974, 123 S. Ct. 1781, 155 L.Ed.2d 662 (2003). On remand, the Court of Appeals concluded that the jury's award was constitutionally excessive and, based upon the extremely reprehensible character of the defendant's conduct, found a 7:1 ratio appropriate. 189 Or. App at 361, 76 P.3d at 676.

The Court also granted certiorari, vacated, and remanded this case. 540 U.S. 801, 124 S. Ct. 56, 157 L.Ed.2d 12 (2003). But, as noted, notwithstanding *State Farm* – and its prior post-*State Farm* decisions -- the Court of Appeals again found nothing wrong with a 97:1 ratio. 193 Or. App. 527, 92 P.3d 126 (2004), *aff'd.*, 340 Or. 35, 127 P.3d 1165, *cert. granted*, 126 S. Ct. 2329 (2006).[6] In justifying its decision on remand, the court relied explicitly on

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[6] As the Court knows, neither did the Oregon Supreme Court, although that court did acknowledge that *State Farm* supplanted *Parrott* (which, implicitly, also means that it supplanted *Oberg II*). The court said:

> "In *Parrott,* this court identified five factors to be considered to determine whether a punitive damage award is grossly excessive:
>
> '[T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct.'
>
> *Parrott* has been superseded somewhat by *State Farm,* but the last three *Parrott* factors are, of course, the *BMW* guideposts as they have been further elucidated by *State Farm.* We consider only those guideposts in the following analysis."

340 Or. at 54, 127 P.3d at 1177 (internal citations omitted).

the unproven assumption that the alleged fraud had seriously harmed at least 100 hypothetical Oregonians:

> "As the Court did in *TXO*, the jury in assessing the amount of punitive damages was entitled to draw reasonable inferences as to the number of smokers in Oregon who had been defrauded during the past decades and would be affected in the future by defendant's conduct, if that conduct were not deterred. Based on the evidence before it, and, particularly, the pervasiveness of defendant's advertising scheme in Oregon, it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that Williams had been misled. Such a conservative calculation of compensatory damages based on William's actual damages and the potential magnitude of damage to the public thus would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary."

193 Or. App. at 562, 92 P.3d at 145.[7] And, finally, in *Goddard v. Farmers Insurance Co.*, 202 Or. App. 79, 120 P.3d 1260 (2005), an

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[7] The Oregon Supreme Court, while rejecting the Court of Appeals' "harm to others" rationale as inconsistent with *State Farm*, 340 Or. at 61-62, 127 P.3d at 1180-81, justified its decision to affirm the Court of Appeals on another basis just as inconsistent with *State Farm*:

> "Of the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost-the ratio-cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated. * * * Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts-reprehensibility and comparable sanctions-can provide a basis for overriding the concern that may arise from a double-digit ratio.

insurance "bad faith" case, the Court of Appeals reduced the jury's $21 million punitive damages award to a 3:1 ratio.[8]

G. Summary

Oregon's cases since *Oberg* have a common theme – despite *BMW* and *State Farm,* punitive damages jury decisions are rarely disturbed (and have *never* been disturbed by the Oregon Supreme Court) and, when they are reduced, the results still don't reflect properly this Court's relevant punitive damages precedents. In Oregon, a 3:1 ratio of punitive damages to compensatory damages has seemingly become the "floor" for any case supporting punitive damages not, as the Court has signaled, particularly in *State Farm*, a 1:1 ratio (or even less or no punitive damages at all where substantial compensatory damages are awarded). And, more disturbingly, in the majority of cases, double-digit ratios and seven figure punitive damages awards set by Oregon juries are still

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> And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme."

340 Or. at 62-63, 127 P.3d at 1181.

[8] In *State Farm,* of course, this Court suggested that "in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), a punitive damages award at or near the amount of compensatory damages" – there, resulting in a 1:1 ratio – would be justified. 538 U.S. at 429, 123 S. Ct. at 1525. Other courts have reached the same conclusion in substantial compensatory damages cases. *See Boerner v. Brown & Williamson Tobacco Co.,* 394 F.3d 594, 603 (8th Cir.2005) (holding that "substantial compensatory damages award" of over $4 million entered against tobacco company, in favor of widower whose wife died from lung cancer required punitive damages to be reduced to a ratio of approximately 1:1); *Williams v. ConAgra Poultry Co.,* 378 F.3d 790, 799 (8th Cir.2004) (concluding that "large compensatory award" of $600,000 in racial harassment claim "is a lot of money" and reducing punitive damages to 1:1 ratio).

approved. So, in reality, what this Court has tried to do to limit large punitive damages awards over the last 20 years has been lost on the state's courts and, certainly, on the Oregon Supreme Court. It, for sure, is not listening. Indeed, for that court, no punitive damages award has ever raised a "suspicious judicial eyebrow." *See BMW*, 517 U.S. at 583, 116 S. Ct. 1589 (quoting *TXO*, 509 U.S. at 481, 113 S. Ct. 2711 (O'Connor, J., dissenting)) (using description).

The clear pattern of Oregon's post-*Oberg* decisions exposes businesses in the state to arbitrary and unreasonable punitive damages awards, particularly in product liability cases. Indeed, in cases substantially similar to this one, there already exist vastly different punitive damages review decisions depending on whether the same tobacco products are sold in Oregon or California. *See Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (2 Dist 2005), *cert. den.*, ___ U.S.___, 126 S.Ct. 1567, 164 L.Ed.2d 297 (2006) (reducing punitive damage award to 9:1 ratio); *Henley v. Philip Morris, Inc.*, 114 Cal.App.4th 1429, 9 Cal.Rptr.3d 29 (1 Dist. 2004), *rev. granted*, 12 Cal.Rptr.3d 591, 88 P.3d 497, *rev. dism'd.*, 18 Cal.Rptr.3d 873, 97 P.3d 814 (Cal. 2004) (reducing punitive damages ratio to 6:1); *but see Bullock v. Philip Morris USA, Inc.*, 138 Cal.App.4th 1029, 42 Cal.Rptr.3d 140 (2 Dist. 2006) (affirming 33:1 ratio; petition for review pending)

This case clearly highlights the problem with Oregon's post-*BMW* and *State Farm* punitive damages jurisprudence: the Oregon Supreme Court expressly held that when conduct, in that court's view, is particularly reprehensible, there is no limit to the size of a resulting punitive damages award, because the reprehensibility of the conduct can simply override the constitutional requirement that a punitive award be proportional to the harm caused to the plaintiff. As a result, any Oregon business that manufactures or sells a product—from consumables to

fishbowls -- that engages in what a jury could decide is "highly reprehensible conduct," risks excessive punitive damages jury awards without any recourse to constitutionally required meaningful appellate review. That, to say the least, is a great concern to the Oregon *amici*.

III. CONCLUSION

To the extent "things look different here" for punitive damages defendants, it's time for the Court to stop that by setting clear standards and clear limits on punitive damages awards that Oregon courts (particularly, its high court) cannot ignore or avoid. Nothing less will get Oregon businesses (and all other Oregon defendants) the meaningful appellate court review of punitive damages awards that this Court has mandated.

DATED this 28th day of July, 2006.

COSGRAVE VERGEER KESTER LLP

Thomas W. Brown
805 SW Broadway, 8th Floor
Portland, OR 97205

Of Attorneys for *Amici Curiae* Oregon Forest Industries Council, Oregon Grocers Association, National Federation of Independent Business/Oregon Chapter, Oregon Restaurant Association, Associated Oregon Industries, and Strategic Economic Development Corporation

CERTIFICATE OF SERVICE

I, Thomas W. Brown, counsel for Oregon *amici* and a member of the Bar of this Court, certify that on this 28th day of July, 2006, I caused three copies of the BRIEF OF OREGON FOREST INDUSTRIES COUNCIL, OREGON GROCERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, OREGON RESTAURANT ASSOCIATION, ASSOCIATED OREGON INDUSTRIES, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER to be served by first-class mail on the following counsel:

James S. Coon, OSB 77145
Raymond F. Thomas, OSB 79416
Swanson Thomas & Coon
820 SW Second Avenue, Suite 200
Portland, OR 97204

William A. Gaylord, OSB 73104
Gaylord Eyerman Bradley PC
1400 SW Montgomery Street
Portland, OR 97201

Hardy Myers, OSB 64077
Michael D. Reynolds, OSB 74269
Department of Justice
1162 Court Street NE
Salem, OR 97301

Charles S. Tauman, OSB 77371
PO Box 19631
Portland, OR 97280

Kathryn H. Clarke, OSB 79189
921 SW Washington, Suite 764
Portland, OR 97205

Maureen Leonard, OSB 82316
520 SW 6th Avenue
Portland, OR 97204

Robert S. Peck, *Pro Hac Vice*
Center for Constitutional Litigation P.C.
1050 31st Street NW
Washington, DC 20007

Kenneth S. Geller
Evan M. Tager
Nickolai G. Levin
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006

William F. Gary, OSB 77032
Sharon A. Rudnick, OSB 83083
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401

Andrew L. Frey
Counsel of record
Andrew H. Schapiro
Lauren R. Goldman
Daniel B. Kirschner
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019